JOHN C. PHARISS

IBLA 93-624 Decided October 4, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting application to purchase trade and manufacturing site AA-54189.

Affirmed.

1. Alaska: Trade and Manufacturing Sites

A BLM decision rejecting a trade and manufacturing site application will be upheld on appeal, when, given the fact that the applicant had built four cabins and cleared trails on the land, his evidence of revenue from his cabin rental business was sporadic and unsupported by the statement of even one individual who used his facilities during the time period in question.

APPEARANCES: Kathy Atkinson, Esq., Anchorage, Alaska, for appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

John C. Phariss has appealed a July 14, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his application to purchase trade and manufacturing (T & M) site AA-54189, situated on public lands in secs. 25 and 26, T. 11 N., R. 8 E., Copper River Meridian, Alaska, containing approximately 80 acres.

Appellant filed a notice of location for the T & M site on September 5, 1984. On June 8, 1988, appellant filed his application to purchase the site, stating therein that he had placed four cabins on the tract, built three bridges, and constructed campsites, trails, and roads for recreational vehicles. He estimated the total value of his improvements to be $10,000. He stated that the commercial operation he conducted on the site was "cabin rental and hiking."

Section 10 of the Act of May 14, 1898, as amended (the T & M Site Act), 43 U.S.C. § 687a (1988) (repealed by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2789, effective Oct. 21, 1986, subject to valid existing claims), provides as follows:

> Any citizen of the United States or any association of such citizens or any corporation * * * in possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry.

Under 43 CFR 2562.3(c), an application to purchase a claim, along with the required proof or showing, must be filed within 5 years after the filing of notice of the claim. Under 43 CFR 2562.3(d)(1), the application must show:

> (1) That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the [T & M Site Act].

In its July 14, 1993, decision BLM rejected appellant's application to purchase the T & M site on the ground that appellant had failed to file proof of use and occupancy, as required by 43 CFR 2562.3. BLM stated that no evidence of use of the site had accompanied the application to purchase, and that, despite a December 29, 1988, notice to provide certain evidence of use and an extension to make such a filing, the required evidence had not been submitted as of the date of the decision. 1/

1/ In its Dec. 29, 1988, notice, BLM requested additional information consisting of, but not limited to, the following:

"1. Copies of the applicant's business license, if any, for 1984 through 1988.

"2. Copies of accounting advises, income tax records or other documents showing the nature and amount of the applicant's income from the business located on the land.

"3. Copies of advertising materials used to advertise the applicant's business.

"4. Statements from persons who have used the facilities provided by the business located on this land. These statements should show dates and the amount paid for the use of the facilities."

Appellant filed a timely appeal of BLM's decision and petitioned the Board for a stay of the decision pending appeal pursuant to 43 CFR 4.21. Appellant also filed a motion for remand. By order dated September 28, 1993, the Board granted the request for stay but denied the motion for remand, finding that appellant's application, including the witness statements therein, was insufficient, standing alone, to support the T & M site claim, and that evidence of a bona fide commercial operation was necessary. Appellant was allowed 30 days from receipt of the order "in which to file with the Board the information originally requested by BLM in 1988; all additional evidence upon which he is relying to support his application to purchase the land in question; and his statement of reasons [SOR] in support of his appeal" (Order at 3).

In his SOR, appellant explains that he has applied for a homesite (AA-59675), a headquarters site (AA-59676), and this T & M site all within approximately 3 miles of each other in a rural area near Slana, Alaska. 2/ In support of his T & M site, he has submitted with his SOR various documents. Exhibit A consists of certifications of State of Alaska business license records showing that licenses had issued to appellant for the years 1984 through 1987, December 1, 1989, through 1990, and March 6, 1992, through December 31, 1993, in the business name of "John Barn or Johns Barn." 3/ That business, as explained by appellant, derived income from various sources--trapping on his 30-mile trapline, which, he asserts, originates at his headquarters site, cabin rentals on his T & M site, and "selling scrap, like scrap lumber, aluminum, and copper, and used items, like old machine parts" (SOR at 3). 4/

Also appended to the SOR as Exhibit B are two letters to appellant, dated March 5 and April 2, 1987, from the Army Corps of Engineers Regulatory Branch Compliance Section (Exh. B). The first informed him that it

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2/ Presently before the Board is appellant's appeal of BLM's rejection of his application to purchase the headquarters site. That appeal is docketed as IBLA 93-625.

3/ Appellant explained in his statement of reasons that he built a two-story combination house and garage on his homesite and that it had a roof shaped like a barn and his friends referred to it as "John's barn." When he applied for a business license, he asserts, he called his business "John's Barn" (SOR at 2).

4/ The certifications each contain a "Standard Industrial Classification" (S.I.C.) number, which had been assigned to the licenses. For the years 1984 through 1987, the S.I.C. code is 5930, and for the other two licenses the code is 6519 with the parenthetical phrase "Lessors of real property, Nec. [not elsewhere classified]." Appellant explains in the SOR at page 5 that the State discontinued use of the S.I.C. code 5930, which represented "used merchandise," "second-hand goods," and "miscellaneous" or "not elsewhere classified."

had received a report "that you are working in wetlands east of the Nebesna Road about four miles from Slana; possibly without the proper Department
of Army (DA) permits." It requested further information. Also included
as part of Exhibit B is appellant's response, a 1½ page handwritten explanation of his planned activities, styled "Permit." The Corps' second letter stated that appellant would not need a DA permit "if you construct
your project as proposed, without the discharge of dredged or fill material * * *." Appellant contends that these letters corroborate the fact that he was making improvements on the site during March or April 1987.

Exhibit C is a statement by one Urban Cachelin, dated September 29, 1993, whose headquarters site claim is adjacent to appellant's T & M site. Cachelin states that "Phariss resided [on the site] from 1984 and off and on until the present date." Cachelin further states that Phariss rented his cabins to James Calvin, Malcolm Fortner, T. J. Fortner, and Carolyn Hegdahl, that Phariss built two additional cabins, in addition to the rental cabins, and that $1,000 worth of clearing was done on the site
by James D. Frey, Jr.

Exhibit D is Frey's affidavit to the effect that he cleared appellant's T & M site during the summers of 1987 and 1988. Appellant submitted another statement (Exhibit E), dated October 14, 1993, by a retired Alaska game warden who described his knowledge of appellant's trapping activities from the late summer of 1986 to June 1993. He describes appellant as an active trapper during the winter months, but he states that he has no knowledge of "how successful John has been at trapping." He does relate that he "had to cite John for using poison to take wolves in January of 1988." 5/

Also submitted with the SOR are copies of appellant's Federal income tax forms for the years 1986 through 1988 (Exh. F). On the Schedule C ("Profit or (Loss) From Business or Profession") for each of those tax years, appellant shows the business of John's Barn as "Scrap Sales and Trapping." The schedules list gross business income of $4,209, $2,150,
and $300 for the years 1986, 1987, and 1988, respectively, and a net business loss for each year.

Exhibit H is a copy of a letter dated January 26, 1989, from one John Jones to appellant seeking a reservation for one of the cabins for 2 weeks in July 1989 and a copy of the $100 check forwarded by Jones as a deposit. Exhibit G is copy of information from the case file recorded by a BLM

5/ Any evidence relating to trapping is not relevant to appellant's qualification for a T & M site. As we stated in Jack Kim, 103 IBLA 104, 106-07 (1988), trapping is not a qualifying use of land under the T & M Site Act; instead, trapping is a use appropriate to acquisition of a headquarters site, pursuant to the Act of March 3, 1927, 43 U.S.C. § 687a (1988).

employee from appellant's receipt book. Appellant presented the Jones letter and a receipt book to BLM on some undisclosed date following receipt
of the December 29, 1988, request for information. The BLM employee apparently made notes while reviewing the receipt book and then returned the book to appellant. Appellant states that the receipt book returned by BLM was destroyed by fire in his house on his homesite in 1990.

The notes prepared by the BLM employee are two undated post-it notes stapled to the copy of the Jones letter showing three names. Under each name is a series of entries, four under the first, six under the second, and two under the third. Each entry, except one, which says "no date," includes a month and sometimes a year (either 1985 or 1986), and a figure of "100." Above an initial or initials on the second note is the following notation: "Cabin Rental Taken from his receipt book by me." The 12 entries total $1,200, $600 for 1985 and $600 for 1986.

Appellant contends that though the income from his cabin rental business was small, it was sufficient to meet the requirements of the T & M Site Act. Appellant argues that the witness statements, photographs of
his cabins (submitted with the August 19, 1993, motion for remand), tax returns, and business licenses "corroborate and support each other" and constitute an "evidentiary showing sufficient to merit * * * a field investigation" (SOR at 18). Appellant again requests a remand and that a field examination be ordered.

BLM answers that the record shows at most that the site was used
only intermittently for campsite rentals. While appellant's Exhibit G shows that for each of the years 1985 and 1986, appellant claimed $600
in receipts for cabin rental, BLM points out that no receipts are shown
for 1987 or 1988. BLM asserts that for 1989 appellant only provided evidence that he received $100 as a deposit for a cabin rental. BLM asserts that appellant has failed to show that, at the time of filing his application to purchase (June 8, 1988), he utilized the land applied for in connection with a cabin rental or hiking business. BLM also contends
that appellant's tax returns for 1986 through 1988 do not allow a determination of what revenues, if any, are attributable to cabin rentals.

BLM has not conducted a field examination of the claim, but does not dispute appellant's assertions that he made improvements on the land and has realized some income from cabin rentals. Also, BLM does not question the veracity of appellant's witness statements nor the accuracy of the information listing renters, dates, and amounts. Rather, BLM contends that the information submitted by appellant fails to substantiate anything more than nominal revenues received from intermittent use as cabin rental and that, therefore, appellant has not made the required showing under the T & M Site Act.

Under the T & M Site Act, any citizen or association of citizens claiming a T & M site must submit proof that the area embraces improvements of the claimant and is needed in the prosecution of the claimant's trade, manufacture, or other productive industry. Section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1988) (also repealed by section 703(a) of FLPMA), instituted the requirement of the filing of a notice of location of a T & M site claim, and also required that the proof or showing must be filed within 5 years after the filing of the notice of claim.

It has long been the rule that a site for a prospective business cannot be acquired under the T & M Site Act, and that the land must actually be used and occupied for the purpose of trade, manufacture, or other productive industry when it was first so occupied. 43 CFR 2562.3(a)(1). This requirement has been consistently interpreted to mean that a T & M site applicant must show, as a present fact at the time of filing the application, that the land applied for was being utilized in connection with some business, trade, or productive industry. United States v. Hodge, 111 IBLA 77, 86 (1989); United States v. Crow, 28 IBLA 345, 349 (1977), aff'd, Crow v. Andrus, No. F77-12 (D. Alaska June 23, 1978), and cases cited therein. Moreover, to make this showing, there must be evidence from which it can be concluded that, as of the date the application is filed, an applicant is engaged in a bona fide commercial enterprise from which he hopes to derive a profit. It is not essential to show that a profitable operation has been developed, but, in the absence of such showing, there must be evidence of an investment of such a nature that a reasonable return could be expected. United States v. Brandt-Erichsen, 46 IBLA 239, 251 (1980); United States v. Ward, 43 IBLA 333, 337 (1979); James E. Allen, A-30085 (Feb. 23, 1965). Receipt of a few dollars over a period of years does not satisfy the T & M site law. United States v. Hodge, supra at 86.

In his application, appellant estimated the value of his improvements to the land to be $10,000. On appeal, he now asserts that "he spent only $200 to $300 developing his T & M site" because he used salvaged materials and recruited the help of family, friends, and neighbors (SOR at 12-13). BLM does not dispute the existence of appellant's improvements. The question presented is whether appellant has provided sufficient evidence from which it can be concluded that he was engaged in a bona fide commercial operation from which he hoped to derive a profit. We find that appellant has not.

[1] First, appellant's evidence of receipts from cabin rentals is clearly sporadic and unsupported. Appellant has provided evidence of a total of $1,300 in receipts from cabin rentals during the 5-year period commencing with the filing of his application on September 5, 1984. 6/

6/ In our order in this case, we stated at page 4, note 4, that given the fact that appellant had filed his application to purchase on June 8, 1988:

The evidence shows $600 received in 1985, $600 in 1986, and $100 for 1989. No receipts are claimed for 1984, 1987, and 1988.

Counsel for appellant contends that another $100 in gross receipts is established by the record because "Mr. Jones presumably paid Mr. Phariss at least another $100 when he and his three friends showed up to rent the cabin for two weeks in July [1989]" (SOR at 15). Appellant does not assert that he, in fact, received more money from Jones. Perhaps, Jones did not show up or possibly he arrived, and, finding the accommodations spartan (see photographs 1-12 at Exhibit H, appended to Motion to Remand), sought a refund. There is no basis in the record for indulging a presumption that appellant received more money from Jones.

In the SOR at 15, counsel for appellant further states that "[d]oubtless, Mr. Phariss received money for cabin rentals exceeding the $1200 to $1400 enumerated above." As a basis for that claim, she directs attention to the statement of Cachelin that appellant rented cabins to four individuals. That statement, however, dated September 29, 1993, provided no dates for the rentals. 7/ Thus, there is no evidence that rentals to any of the named individuals occurred during the critical time period. Moreover, if, in fact, those individuals did rent cabins, appellant has provided no evidence, such as statements from those individuals, regarding their occupancy. 8/

Since January 25, 1989, when he received BLM's letter requesting proof that he had complied with the T & M site law, appellant has been on notice of the necessity to provide evidence in support of his claim, including "[s]tatements from persons who have used the facilities provided by the business located on this land" with "dates and the amount paid for the use of the facilities." Yet, to date, appellant has not supplied even one statement from any individual who actually used his facilities during the time period in question.

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fn. 6 (continued)

"[I]t is arguable that his evidence in support of his claim showing the nature and extent of his business operated on the claim must date from on or before June 8, 1988. However, for purposes of this order we do not take a position as to the cut off date for such evidence, except to rule that it can be no later than five years from September 5, 1984. See United States v. Hodge, 111 IBLA 77 (1989).

We need not rule on that issue in this decision because, whichever date is used in reviewing the evidence, the result is the same.

7/ Cachelin merely stated that appellant resided on his T & M site "from 1984 and off and on until the present date" and that he "utilized the T & M for cabin rentals to the following individuals * * *."

8/ We note that one of the individuals mentioned by Cachelin is stated by him to be a "Slana resident," and, thus, presumably easily contacted by appellant.

Second, the copies of tax returns provided by appellant for the years 1986, 1987, and 1988 completely undercut any assertion by appellant that he established a bona fide cabin rental business on the site during three of the critical years. If, in fact, as asserted by appellant, "John's Barn" derived income from three sources, why on Schedule C of each of those returns is appellant's business described as "Scrap Sales & Trapping?" There is no mention of cabin rentals, purportedly a business he was conducting during those tax years under the name "John's Barn." The total gross business income reported on each of the Schedule C's is not broken down into the amounts obtained from appellant's various activities. Therefore, we conclude that his tax returns do not show any income derived from cabin rentals for any of the 3 years and are inconsistent with his claim that in 1986 he received $600 from the rental of his cabins.

Appellant seeks to distinguish the instant case from United States v. Crow, supra, stating that unlike Crow, appellant's rentals were not intermittent and he had four cabins on the site rather than only one. 9/ While the facts in this case are different than in Crow, our conclusion is not. Even accepting the notations from appellant's receipt book as evidence of receipt of income from cabin rentals, appellant has established nothing more than that he received, intermittently over a period of 2 years, a small amount of money for cabin rentals. During 1987 and 1988, he received no income from rentals.

We find that such evidence provides an insufficient basis upon which to conclude that appellant was involved in a bona fide cabin rental business on the T & M site from which he hoped to derive a profit.

In our September 28, 1993, order we stated at footnote 5: "Depending on what evidence appellant can provide for the period in question, a field examination might be relevant." BLM has acknowledged the existence of appellant's improvements and does not dispute the documentary information he submitted. On the state of the record nothing would be gained by a field examination, and appellant's renewed request for remand for that purpose is denied. Moreover, given the number of opportunities appellant has been granted to provide evidence in support of his claim over the years and the paucity of relevant evidence presented, we find no necessity for referring this case to the Hearings Division for a hearing on whether the requirements of the T & M site law have been satisfied.

9/ Similarly, appellant asserts that the case now before us is significantly different on the legally dispositive facts from United States v. Hodge, supra, and Jay Frederick Cornell, 4 IBLA 11 (1971), aff'd Cornell v. Morton, No. 73-1930 (9th Cir. Sept. 3, 1974). Having reviewed those cases, we find that this case presents no distinguishing circumstances of fact which would remove it from the ambit of the holdings therein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge